IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CITYSURF, INC.,	)	ENTERED ON DOCKE
	)	
Plaintiff,	)	DATE MAY 20 1999
	)	
v.	)	Case No. 98-CV-9-H
	)	
AMERICAN BUSINESS INFORMATION AND DATABASE AMERICA COMPANIES, INC.,	)	FILED
	)	MAY 18 1999
Defendant.	)	Phil Lombardi, Clerk U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court on Defendant American Business Information and Database America Companies, Inc.'s Motion for Summary Judgment filed February 21, 1999 (Docket # 21). The Court duly considered the issues and rendered a decision in accordance with the order filed on May 17, 1999.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Defendant and against Plaintiff in the amount of $84,566.50.

IT IS SO ORDERED.

This 17TH day of May, 1999.

Sven Erik Holmes
United States District Judge

38

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CITYSURF, INC., Plaintiff,	)	
v.	)	98-CV-9-H
AMERICAN BUSINESS INFORMATION AND DATABASE AMERICA COMPANIES, INC., Defendants.	)	

ORDER

This matter comes before the Court on Defendant American Business Information and Database America Companies, Inc.'s ("DBA's") Motion for Summary Judgment filed February 21, 1999 (Docket # 21). The Court held a hearing on the motion on May 5, 1999. In its motion, DBA seeks summary judgment on Plaintiff CitySurf's claims of fraud, interference with prospective business advantage, and violations of 18 U.S.C. § 1030, as well as on its counterclaim for recovery of money due and owing under the License Agreement executed by the parties. For the reasons expressed herein, the Court concludes that the motion should be granted.

I

For purposes of the instant motion, the following facts are undisputed.

1. Plaintiff CitySurf, a corporation formed on August 4, 1995, sought to develop a website featuring an electronic, multiple listing directory similar to the Yellow Pages and attract advertising sponsors and consumers to such website.

2. Defendant DBA is the owner of a proprietary database of businesses known as the

37

"Database America All Business File." The Database America All Business File is a database of business listing information compiled by DBA from a variety of sources, and contains listing information for businesses throughout the country, including name, address, telephone number, and business classification.

3. DBA and CitySurf executed a Reseller's License Agreement ("Agreement") on July 9, 1996. Anthony Link, CitySurf's President, signed the agreement on CitySurf's behalf.

4. For an agreed-upon price, DBA granted CitySurf a license to use and display information from DBA's database on CitySurf's website. DBA also agreed to develop a search engine that would allow CitySurf's users to search for a business by name, alphabetically, and by business category from DBA's database.

5. In exchange for DBA's license to use its materials, CitySurf agreed to pay DBA either $80,000 or 5% of the net revenues CitySurf realized from its sale of banner advertisements, whichever was greater. CitySurf also agreed to pay DBA at a rate of $125.00 per hour for the development of the search engine and for any additional work CitySurf requested from DBA.

6. The Agreement allowed DBA to terminate the Agreement upon 30 days written notice to CitySurf if CitySurf breached one of its material obligations under the Agreement and failed to cure the breach within thirty days. DBA could also terminate the agreement without cause by providing CitySurf with 90 days written notice. Upon termination of the Agreement, the Agreement provided that CitySurf's obligation to pay fees accrued prior to termination survived termination and remained in full force and effect.

7. If CitySurf were in material default under the terms and conditions of the Agreement and

failed to cure the default within 60 days of written notice from DBA, then all right, title, and interest of customized search engine would revert to DBA in its entirety and without further obligation by DBA.

8. The Agreement is in all respects binding on CitySurf, and constitutes the complete and exclusive statement of the terms of the agreement between DBA and CitySurf.

9. After the parties executed the Agreement, DBA provided CitySurf with access to the Database America All Business File and developed the customized software search engine.

10. By the end of February 1997, CitySurf owed DBA over $100,000.00. CitySurf agreed to a payment plan to pay the debt in full.

11. In early 1997, ABI merged with DBA, and all accounts receivables for DBA licenses were transferred to ABI. ABI directed CitySurf to make payment to ABI's license division.

12. By letter dated June 19, 1997, National Securities Corporation, the underwriter for CitySurf's private placement, requested on CitySurf's behalf "a 14 to 21 day extension to pay their outstanding balance." The letter assured DBA that CitySurf "had every intention of paying their entire outstanding balance" and that the extension requested would "give [CitySurf] the wherewithal to pay ABI in full." DBA granted CitySurf with the requested extension of time, but indicated that no further extensions would be granted.

13. On June 25, 1997, DBA provided written notice to CitySurf's president Anthony Link that DBA was exercising its rights under the Agreement to terminate the Agreement with

90 days notice.

14. On July 25, 1998 a $ 75,000.00 check tendered by CitySurf to DBA was returned for insufficient funds, and CitySurf stopped payment on another check dated July 30, 1997 in the same amount.

15. On August 7, 1997, DBA provided written notice to CitySurf with 30 days written notice of DBA's intention to terminate the Agreement for CitySurf's default of its payment obligations. In this letter, DBA reaffirmed DBA's intent to terminate the Agreement pursuant to the 90-day notice provision provided on June 25, 1997.

16. On September 4 and 5, 1997, CitySurf's president Anthony Link informed DBA that CitySurf had signed agreements for short-term capital and would use the proceeds to pay DBA in full.

17. In response, DBA warned that CitySurf's failure to pay the balance in full by October 15, 1997, would result in DBA's termination of the Agreement pursuant to the 90-day and 30-day written notices of termination previously given to CitySurf. On September 23, 1997, CitySurf's president Anthony Link called DBA and left a message indicating that payment would be made by the beginning of the following week.

18. CitySurf failed to pay the remaining balance by October 15, 1997. DBA again notified CitySurf by letter that DBA intended to terminate the Agreement and turn off CitySurf's access to the search engine.

19. Again, City Surf promised it would pay DBA in full once CitySurf received the proceeds of the private placement. By letter dated December 18, 1997, CitySurf indicated it would "wait no longer to receive payment" and would "pursue immediate legal action to recover

the moneys owed." However, DBA delayed termination because CitySurf's attorney promised CitySurf would provide partial payment within a few days.

20. Despite these promises, CitySurf never paid DBA. On January 2, 1998, SBA notified CitySurf's attorney that DBA would terminate access to the search engine and commence legal action.

21. CitySurf's President, Anthony Link, asserted by affidavit that CitySurf never intended to make payment, and that the assurances made by CitySurf to DBA were intended to placate DBA until CitySurf could make arrangements to recover data and compute systems in DBA's possession.

22. CitySurf filed this action on January 7, 1998.

23. Exclusive of interest, CitySurf currently owes DBA $84,566.50.

II

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

> [t]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986)

("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

> [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

III

The Court first turns to DBA's counterclaim against CitySurf for money allegedly due DBA under the License Agreement. Based on a careful review of the record, the Court

concludes that DBA is entitled to summary judgment on its counterclaim. The undisputed facts of this case indicate that CitySurf repeatedly and consistently acknowledged the debt DBA seeks to recover. The record is replete with the oral assurances given to DBA's representatives by CitySurf's president Anthony Link that CitySurf would pay the debt in full and written affirmations of CitySurf's indebtedness in the amount of $84,566.50 by CitySurf employees. See Defendant's Opening Memorandum in Support of their Summary Judgment Motion, ex.18 (Letter from Steven Purcell to Accounts Payable Department of Virtual Media Services dated December 8, 1997). CitySurf seeks to repudiate these acknowledgments by indicating that despite these assurances CitySurf never intended to pay DBA; indeed, in CitySurf's own Response CitySurf's president indicates these statements were attempts to "placate" DBA until CitySurf could recover data and a computer system in DBA's possession. At best, these statements fail to controvert the consistent and express acknowledgments of the debt by CitySurf; at worst, they are evidence of CitySurf's bad faith. In any event, they do not controvert the clear and unequivocal evidence presented by DBA regarding CitySurf's indebtedness. Accordingly, DBA is entitled to summary judgment against CitySurf on its counterclaim for the money due DBA under the License Agreement.

The Court next turns to DBA's request for summary judgment on CitySurf's claims for fraud and interference with prospective business advantage. Based on a careful review of the record in this case, the Court concludes that DBA is entitled to summary judgment on CitySurf's tort claims. Oklahoma law clearly establishes that parties to a valid contract may not recover economic losses arising from an alleged breach of that contract via a tort theory. See, e.g., Waggoner v. Town & Country Mobile Homes, Inc., 808 P.2d 649, 653 (Okla. 1990). CitySurf's

allegations of fraud and interference with prospective business advantage relate solely to the economic loss sustained by CitySurf due to DBA's alleged failure to meet CitySurf's performance expectations regarding the search engine. See Amended Complaint, ¶¶ 9-10; see also Plaintiff's Objection to Defendant's Motion for Summary Judgment at 3-5. The undisputed facts clearly indicate that CitySurf and DBA included in the contract clear and unequivocal limitations on liability for any breach of that contract, see Defendant's Opening Memorandum in Support of their Summary Judgment Motion, ex.1 at ¶ 12 (License Agreement), that the Agreement constitutes the complete and exclusive statement of the terms of the agreement between DBA and CitySurf, see id. at ¶ 15.2, ¶7.1, and that CitySurf understood and accepted the terms of that Agreement. See id. Accordingly, CitySurf's recovery for any alleged damages arising from a failure to perform under the contract is restrained by the economic loss doctrine, and Plaintiff's fraud and interference with prospective advantage claims, which sound in tort, must be dismissed.

Finally, as to Plaintiff's claim under 18 U.S.C. § 1030, a federal computer fraud statute, CitySurf similarly claims that DBA wrongfully refused to return the search engine to CitySurf upon termination of the Agreement. Section 1030 provides an avenue for recovery for whomever "intentionally accesses a protected compute without authorization." 18 U.S.C. § 1030(a)(5)(C). Again, however, the Agreement specifically grants DBA "all right, title and interest of customized search engine . . ." See Defendant's Opening Memorandum in Support of their Summary Judgment Motion, ex.1 at ¶ 6.2 (License Agreement). Accordingly, under the express terms of the Agreement, DBA's access to the search engine was explicitly authorized, and CitySurf cannot maintain a claim for relief under 18 U.S.C. § 1030.

Based on the above, the Court concludes that DBA is entitled to summary judgment against CitySurf on CitySurf's claims for fraud, interference with prospective advantage, and violation of 18 U.S.C. §1030, as well as against CitySurf on its counterclaim for money owed under the Agreement. The Court need not reach DBA's alternative arguments for summary judgment on CitySurf's fraud and interference with prospective advantage claims. Accordingly, Defendant American Business Information and Database America Companies, Inc.'s ("DBA's") Motion for Summary Judgment filed February 21, 1999 (Docket # 21) is hereby granted. All other pending motions are hereby rendered moot.

IT IS SO ORDERED.

This 15TH day of May, 1999.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LOCKARD AIRCRAFT SALES CO., INC., an Oklahoma Corporation,

Plaintiff,

v.

CAB AIR, INC., a Delaware Corporation; JET SYSTEMS, a Delaware Corporation; JET RESOURCES, a Delaware Corporation; and ROBERT STANFORD, an individual,

Defendants.

CASE NO. 99-CV-0239B(M)

JOINT STIPULATION OF DISMISSAL

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the Plaintiff, Lockard Aircraft Sales Co., Inc., and the Defendants, CAB Air, Inc., Jet Systems, Jet Resources and Robert Stanford, jointly stipulate and agree that this action should be and is hereby dismissed with prejudice, each side to bear its own costs, attorneys' fees and expenses.

Respectfully submitted,

Scott Troy, OBA #11714
406 South Boulder, Suite 405
Tulsa, Oklahoma 74103

ATTORNEY FOR PLAINTIFF

R. Michael Cole, OBA #14698
CROWE & DUNLEVY
A Professional Corporation
500 Kennedy Building
321 South Boston Avenue
Tulsa, Oklahoma 74103-3313
(918) 592-9800
(918) 592-9801 FAX

ATTORNEYS FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAY 19 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CONNIE RODRIGUEZ,

Plaintiff,

v.

BAMA COMPANIES, INC.,

Defendant.

Case No. 98 CV-652 C(E)

ENTERED ON DOCKET
DATE MAY 20 1999

STIPULATION OF DISMISSAL WITH PREJUDICE

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, through their undersigned counsel of record, that the above-entitled matter is dismissed with prejudice and without costs to any party herein.

DATED this 19th day of May, 1999.

Dale Ray Gardner
7 South Park Street
Sapulpa, OK 74066-4219-01

ATTORNEYS FOR THE PLAINTIFF

J. Ronald Petrikin, OBA #7092
Nancy E. Vaughn, OBA #9214
CONNER & WINTERS
3700 First Place Tower
15 East Fifth Street
Tulsa, OK 74103-4344

ATTORNEYS FOR THE DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BERNICE ALEXANDER,

Plaintiff,

vs.

WILLIAM CLINTON, President of the United States of America, *et al.*

Defendants.

Case No. 97-C-759-E

ORDER

The court notes that Plaintiff's motion to proceed *in forma pauperis* was denied on September 29, 1997. Since that time, plaintiff has failed to file the required filing fee, no summons has been issued, and no defendant served. Accordingly, this matter is **dismissed** pursuant to Fed.R.Civ.P. 4(m).

IT IS SO ORDERED THIS 18TH DAY OF MAY, 1999.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EUGENE T. FOUST, et al.,

Petitioners,

vs.

STATE OF OKLAHOMA, et al.,

Respondents.

Case No. 90-C-792-E

ORDER

Now before the Court is the Motion to Dismiss and Brief in Support (Docket #23) of the State of Oklahoma, Department of Human Services.

Petitioner, Eugene T. Foust filed this Amended Petition for Writ of Habeas Corpus on March 22, 1999, approximately 9 years after his original Petition for Writ of Habeas Corpus was dismissed by this Court. In this action, Foust seeks the "release" of "M.A.J., The Minor Child in Question, who is being illegally held in the custody of the State of Oklahoma Department of Human Services." Foust's claims are based on state court rulings in a deprived action in Tulsa County, Oklahoma, case number JVD-87-107, wherein the rights of the mother were terminated as to the minor child. The state seeks dismissal of these claims, asserting that Foust has no standing to seek relied in this court, and that the minor child is not "in custody" for the purposes of Federal Habeas Corpus.

The state argues that Foust, as step father of the minor child and common-law husband of her mother, has no standing to act in their behalf. Foust asserts (but doe not provide any evidence) that he is the natural father of the minor child, but that he had not been able to prove it previously. The Court need not decide whether this creates a legitimate issue as to standing because the matter

can be decided on other grounds.

The State also argues that the minor child is not "in custody" for the purposes of federal habeas corpus and federal habeas corpus is not an available remedy to challenge child custody. Anderson v. State of Colorado, 793 F.2d 262, 263 (10th Cir. 1986) is directly on point:

> At the outset, we note that Mr. Anderson's attempt to invoke federal habeas corpus jurisdiction under 28 U.S.C. § 2254 (1982) has been foreclosed by the Supreme Court's decision in *Lehman v. Lycoming County Children's Services*, 458 U.S. 502, 102 s.Ct. 3231, 73 L.Ed.2d 928 (1982). In *Lehman*, the Court held that section 2254 does not confer jurisdiction on federal courts to review state court judgments involuntarily terminating parental rights. *Id.* 458 U.S. at 516, 102 S.Ct. at 3240. In reaching this conclusion, the Court observed that '[t]he 'custody' of foster or adoptive parents over a child is not the type of custody that traditionally has been challenged through federal habeas.' *Id.* at 511, 102 S.Ct. at 3237 (footnote omitted).

The Court finds that federal habeas is not an appropriate remedy in this situation

Defendant's Motion to Dismiss (Docket #23) is GRANTED. Because the law of this Circuit is clear that Foust does not have a federal habeas claim, his Motion for Joinder of Additional Parties and for Show Cause Order (Docket # 26), and his Motion for Leave of Court to File Motion for Extension of Time Out of Time (Docket #25) are DENIED.

IT IS SO ORDERED THIS 18th DAY OF ~~OCTOBER~~ MAY, 1999.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE MAY 19 1999

ANGELA SANDEFUR, and MICHAEL SANDEFUR as Natural Parents and Next Friend of ALEXIS SANDEFUR,

Petitioners,

-vs-

THE STATE OF OKLAHOMA and OKLAHOMA DEPARTMENT OF HUMAN SERVICES,

Respondents.

FILED
MAY 19 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-0232H (M)
JUDGE HOLMES

STIPULATED DISMISSAL WITHOUT PREJUDICE

COMES NOW, the Petitioners, Angela Sandefur and Michael Sandefur, by counsel Joe L. White, and through Tony Mareshie, and hereby dismiss *without* prejudice all claims for relief contained in their Petition for Writ of Habeas Corpus in the instant above-styled and numbered matter. All parties served in the above-entitled matter stipulate to said dismissal *without* prejudice.

CATHERINE O'LEARY, OBA #6765
JOSEPH W. STREALY, OBA #8686
Assistant General Counsel
Department of Human Services
P. O. Box 53025
Oklahoma City, OK 73152-3025
(405) 521-3638
ATTORNEYS FOR RESPONDENTS

TONY MARESHIE, OBA #18180
JOE L. WHITE, OBA #10521
1718 West Broadway
Collinsville, OK 74021
(918) 371-2531
ATTORNEYSFOR PETITIONERS

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

NATIONAL ENVIRONMENTAL SERVICE COMPANY, an Oklahoma Corporation,

Plaintiff,

v.

RONAN ENGINEERING COMPANY, a California Corporation; and MOTOROLA, INC., a Delaware Corporation,

Defendants.

ENTERED ON DOCKET
DATE MAY 19 1999

Case No. 97-CV-860-H

FILED
MAY 18 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on a motion for summary judgment by Defendant Motorola, Inc. ("Motorola") (Docket # 39). Motorola seeks summary judgment on Defendant Ronan Engineering Company's ("Ronan") cross-claim against Motorola for contribution and/or indemnity. Arguments were heard before the Court on March 18, 1999.

I

This cause of action was initially brought by Plaintiff National Environmental Service Company ("NESCO") against Defendant Ronan. Subsequent to filing its complaint against Defendant Ronan, Plaintiff NESCO added Defendant Motorola to this action, alleging two causes of action including breach of contract and negligent misrepresentation. On July 22, 1998, the Court granted Motorola's motion to dismiss NESCO's breach of contract claim, but denied dismissal of NESCO's negligent misrepresentation claim. On November 12, 1998, Defendant Ronan brought a cross-claim against Motorola, asserting a right to contribution and/or indemnity. Motorola then moved for summary judgment on Plaintiff NESCO's negligent misrepresentation claim, and on Defendant Ronan's claim of contribution and/or indemnity. At the summary judgment hearing held on March 18, 1999, the Court granted Motorola summary judgment

69

against Plaintiff NESCO, while taking under advisement that portion of Motorola's motion pertaining to Defendant Ronan's cross-claim. The parties have filed additional briefs in connection with this issue.

The facts relevant to determining Defendant Ronan's right to contribution and/or indemnity are as follows: in 1994, the United States Corps of Engineers ("Corps") commissioned NESCO to provide it with a leak detection system designed to communicate by telephone. After Ronan installed its system for the Corps, the Corps then required that the leak detection system communicate by radio transmission instead of by telephone. Ronan considered the project to develop a radio communication system to be a non-standard job. Further, Ronan, as a standard practice, immediately involved its engineering department in non-standard jobs, particularly before making a binding quotation. Ronan also had a policy of not committing to provide a system that it had not tested.

In November 1995, Jim Hawkins, a Motorola representative, provided Ronan with a price list for a Motorola R-Net radio communication system. Ronan had never tested its leak detection system with any radio communication system, and no one at Ronan had reviewed a specification sheet for the Motorola R-Net radio. Additionally, no one in the Ronan engineering department became involved with the project at the time Mr. Hawkins provided Ronan with a price list.

After receiving Motorola's price list, Ronan provided a quotation to Plaintiff NESCO in November 1995, and a similar quotation in February 1996, stating that the quote was "a cursory view for budgetary purposes." Based on Ronan's quotations, NESCO submitted a proposal to the Corps to install the R-Net radio system in place of the phone-based communication system. NESCO's proposal, however, failed to include the same language that Ronan's two quotations to NESCO contained regarding the quotations being cursory views for budgetary purposes. In April 1996, the Corps accepted NESCO's proposal.

In May and June 1996, Ronan's engineering department became involved in the project to determine whether Motorola's R-Net radios would work with Ronan's equipment. Ronan received from Motorola specifications for the R-Net radios and three sample R-Net radios for evaluation purposes. At that time, Ronan determined that Motorola radios would not work with Ronan's equipment. In August 1996, Ronan notified NESCO that the radio system quoted in February would not work for NESCO's application. As a result, NESCO and the Corps installed a more expensive system.

Motorola moves for summary judgment on Ronan's cross-claim for contribution and/or indemnity based on these undisputed facts.

II

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Ins. Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

> [t]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

> [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

III

Defendant Motorola argues that Oklahoma law does not support Defendant Ronan's cross-claim against Motorola for contribution and/or indemnity. Specifically, Motorola argues that because the Court has held that Motorola is not liable to Plaintiff NESCO on any of NESCO's claims, Motorola cannot be jointly and severally liable with Defendant Ronan, which is required in order to maintain an action for contribution. Motorola further argues that Ronan's claim for indemnity fails on two grounds: first, that a suit for indemnity does not accrue until after judgment is entered against the party seeking indemnity; secondly, that NESCO does not seek to hold Ronan constructively or vicariously liable for any acts of Motorola, which is the

only basis upon which Ronan would have an indemnity right against Motorola. In contrast, Defendant Ronan argues that it is potentially liable to NESCO for the alleged negligence of Motorola. In this regard, Ronan suggests in its supplemental response brief that, "to the extent Ronan's claims for contribution and/or indemnity are no longer viable due to the Court[] [granting Motorola] summary judgment [against NESCO], Ronan's cross claim be amended to conform to the evidence and to state a claim for negligence" against Motorola. Def. Ronan's Supplemental Resp. Br., at 4. Plaintiff NESCO filed a response to Ronan's supplemental response brief, arguing that the Court should allow Ronan to amend its cross-claim.

Oklahoma law provides that in order for a person to be entitled to contribution under the Uniform Contribution Among Tortfeasors Act, Okla. Stat. Ann. tit. 12, § 832 (West 1988 & Supp. 1999), "the parties must be jointly and severally liable." Daughtery v. Farmers Coop. Ass'n, 790 P.2d 1118, 1120 (Okla. 1989). Further, "[a]n allegation that the party against whom contribution is sought is solely liable to the plaintiff, or that the party seeking contribution is not liable at all, is insufficient," Id. at 1120-21, to maintain a claim of contribution.

In contrast, indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person. Okla. Stat. Ann. tit. 15, § 421 (West 1993). "[T]he right of indemnity may arise out of an express (contractual) or implied (vicarious) liability." National Union Fire Ins. Co. v. A.A.R. Western Skyways, Inc., 784 P.2d 52, 54 (Okla. 1989). With respect to implied indemnity, "the right rests upon fault of another which has been imputed or constructively fastened upon he who seeks indemnity," Daughtery, 790 P.2d at 1120, and "is in no manner responsible for [the caused] harm." Central Nat'l Bank of Poteau v. McDaniel, 734 P.2d 1314, 1316 (Okla. 1986). Further, a claim for indemnity against loss does not arise until the person who seeks indemnity has paid the former judgment." See Daughtery, 790 P.2d at 1120; see also McDaniel, 734 P.2d at 1316.

Based upon a review of the record and relevant case law, the Court finds that Defendant Ronan is unable to maintain an action for contribution against Defendant Motorola. As noted above, a prerequisite for a claim of contribution under Oklahoma law is joint and several liability among joint tortfeasors. The Court, however, has found that Motorola is not liable to Plaintiff NESCO in any respect by granting Motorola dismissal of NESCO's breach of contract claim and summary judgment on NESCO's negligent misrepresentation claim. Thus, there can be no contribution in this situation since Motorola is not liable to NESCO and, as a result, cannot be jointly and severally liable with Defendant Ronan.[1]

In addition, the Court finds that Defendant Ronan has no indemnity right against Motorola. An indemnity cause of action for loss has yet to accrue since there has been no judgment entered in this matter requiring Ronan to pay Plaintiff NESCO, nor has there been any payment by Ronan to NESCO. Assuming arguendo that an indemnity claim has accrued, the Court finds that Ronan's claim fails on the merits. Ronan has not alleged, and the record does not support, the existence of any express agreement between Ronan and Motorola whereby Motorola agreed to indemnify Ronan for the legal consequence of either parties' conduct. Further, a Ronan claim of indemnity based on implied indemnity is infirm in two respects: first, Plaintiff NESCO has not alleged that Ronan is constructively or vicariously liable to NESCO because of tortious conduct by Motorola. Instead, NESCO only seeks to hold Ronan directly liable for its own conduct based on claims of breach of contract and negligent misrepresentation. Secondly, since the Court has found that Motorola did not engage in tortious conduct against NESCO, Ronan can only be directly liable to NESCO and not vicariously liable by virtue of some alleged legal relationship with Motorola.

[1] In its supplemental brief, Motorola also argues that contribution is available only where there has been injury to "person or property," and NESCO's alleged damages are economic in nature. Def. Motorola's Supplemental Br., at 4. Given the disposition of Ronan's contribution claim, the Court need not reach Motorola's alternative argument.

With respect to Ronan's alternative suggestion that the Court allow Ronan to amend its cross-claim "to conform to the evidence," the Court finds that such request is untimely, as well as procedurally improper. Ronan makes its request to amend its cross-claim for the first time in its supplemental response brief filed on April 16, 1998. This request comes long after Ronan filed its cross-claim against Motorola on November 12, 1998, and its response to Motorola's motion for summary judgment on December 21, 1998. Further, because it has been made in the form of an alternative argument, instead of a properly filed motion, Ronan's request in effect suggests that the Court should sua sponte amend Ronan's cross-claim; an action by the Court which is procedurally impermissible. See Fed. R. Civ. P. (7)(b)(1).[2] Thus, the Court is precluded from even reaching the merits of Ronan's request since it is both untimely and procedurally improper and, as a result, has no legal effect. Accordingly, the Court declines to consider the request contained in Ronan's supplemental response brief.

For the reasons set forth above, Defendant Motorola's motion for summary judgment on Defendant Ronan's cross-claim for contribution and/or indemnity (Docket # 39) is hereby granted.

IT IS SO ORDERED.

This 17TH day of May, 1999.

Sven Erik Holmes
United States District Judge

[2] Rule 7(b)(1) of the Federal Rules of Civil Procedure in relevant part provides:

> An application to the court for an order shall be by motion which . . . shall be made in writing, shall state with particularity the grounds thereof, and shall set forth the relief sought.

EOD 5/19/99

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

NATIONAL BANK OF CANADA, Plaintiff v. PERFORMANCE VALVE & CONTROLS, INC. RICHARD J. BEDNAR JOHN R. PRICE B.P. LOUGHRIDGE BARBARA BEDNAR CRESCENT MANAGEMENT COMPANY, INC. ALTA VERDE, INC. BPL 91-1, A PARTNERSHIP, UNIVERSAL TRADE FINANCE, INC. and STILLWATER NATIONAL BANK AND TRUST COMPANY Defendants	§	No. 97 CV 796BU(W)

FILED

MAY 18 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE MAY 19 1999

AGREED TO DISMISS WITH PREJUDICE
CLAIMS CONCERNING B.P. LOUGHRIDGE

All claims of National Bank of Canada against B.P. Loughridge and all claims of B.P. Loughridge against National Bank of Canada are hereby dismissed with prejudice. Each party shall bear its own costs of court. .

UNITED STATES DISTRICT JUDGE

AGREED

Richard M. Hunt
Attorney for National Bank of Canada

W. Kyle Tresch
Attorney for B.P. Loughridge

EOD 5/19/99

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

NATIONAL BANK OF CANADA, Plaintiff, v. PERFORMANCE VALVE & CONTROLS, INC.; RICHARD J. BEDNAR; JOHN R. PRICE; B.P. LOUGHRIDGE; BARBARA BEDNAR; CRESCENT MANAGEMENT COMPANY, INC; ALTA VERDE, INC.; BPL 91-1, A PARTNERSHIP; JAMES ECKHART; UNIVERSAL FACTORING COMPANY, INC.; UNIVERSAL TRADE FINANCE, INC.; and STILLWATER NATIONAL BANK AND TRUST COMPANY, Defendants.	)	No. 97 CV 796BU(J)

FILED
MAY 18 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

DISMISSAL OF RICO CLAIM IN FOURTH AMENDED COMPLAINT AS AGAINST THE STILLWATER NATIONAL BANK AND TRUST COMPANY, WITH PREJUDICE

The joint motion of Plaintiff, National Bank of Canada, and Defendant, The Stillwater National Bank and Trust Company, is hereby granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

A. Counts Five, Six and Eight of the Fourth Amended Complaint are dismissed with prejudice as against The Stillwater National Bank and Trust Company; and

B. National Bank of Canada and The Stillwater National Bank and Trust Company shall each bear its own respective attorney fees and costs as to the dismissed matter.

DONE May 18, 1999.

MICHAEL BURRAGE, U.S. District Judge

108

APPROVED:

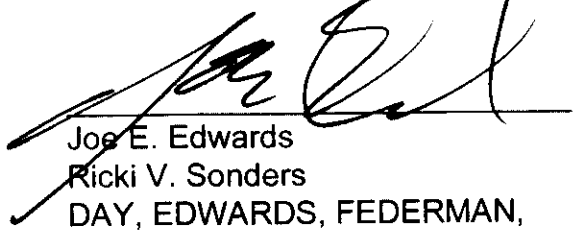
ATTORNEYS FOR PLAINTIFF, NATIONAL BANK OF CANADA

Richard M. Hunt
DONAHOE, JAMESON & CARROLL, P.C.
3400 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270-2120
Telephone: (214) 747-5700
Telecopier: (214) 744-0231

Robert H. Gilliland, Jr.
James R. Webb
John N. Hermes
McAFEE & TAFT
10TH Floor, Two Leadership Square
211 N. Robinson
Oklahoma City, OK 73102
Telephone: (405) 235-9621

APPROVED:

ATTORNEYS FOR DEFENDANT, THE STILLWATER NATIONAL BANK AND TRUST COMPANY



Joe E. Edwards
Ricki V. Sonders
DAY, EDWARDS, FEDERMAN, PROPESTER & CHRISTENSEN, P.C.
210 Park Avenue, Suite 2900
Oklahoma City, Oklahoma 73102
Telephone: (405) 239-2121
Telecopier: (405) 236-1012

William J. Baker
HERT & BAKER, P.C.
P.O. Box 668
Stillwater, Oklahoma 74076
Telephone: (405) 377-8644
Telecopier: (405) 377-6363

Dismissal568SNB.FINAL.doc

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA)
)
Plaintiff,)
)
v.) Civil No. 99CV0079BU(E)
)
JIMMY M. SMITH; and)
ROBERT D. MARSTERS as trustee of the)
CROW-MARSTERS REVOCABLE LIVING)
TRUST;)
)
Defendants.)

JUDGMENT

Upon consideration of the United States' Motion for Default Judgment as to the defendant Robert D. Marsters, as trustee of the Crow-Marsters Revocable Living Trust, the Court hereby grants partial judgment and finds that Robert D. Marsters as trustee is in default. Pursuant to Rule 55(b)(2) of the Federal Rules of Civil Procedure, the Court enters the following judgment against Robert D. Marsters as trustee and in favor of the United States:

1. That one-half of the interest held by the Crow-Marsters Revocable Living Trust in the property described as:

> Lot Twenty One (21), Block Two (2), RIVERSIDE SOUTH, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the Recorded Amended Plot thereof (Commonly known as 5675 S. Boston Avenue, Tulsa, Oklahoma)

is held by the Trust as the alter ego, nominee, or agent of Jimmy M. Smith and that this interest should be disregarded.

2. That the United States has valid and subsisting federal tax liens on Jimmy M. Smith's one-half interest in the property described in paragraph 2 above, which are superior to any legal and equitable interests of the Crow-Marsters Revocable Living Trust in this property.

IT IS HEREBY ORDERED

This 18 day of May, 1999.

United States District Court Judge

Judgment proposed by:

CARL J. TIERNEY
Trial Attorney
U.S. Department of Justice, Tax Division
P. O. Box 7238, Ben Franklin Station
Washington, D.C. 20044
Tel. (202) 514-6499

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JACK RAMSEY,

Petitioner,

vs.

CATHY STOCKER, DISTRICT ATTY, Garfield County; STATE OF OKLAHOMA,

Respondent.

No. 99-CV-357-E (J)

ORDER OF TRANSFER

Petitioner, a state prisoner appearing pro se, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and a motion for leave to proceed in forma pauperis. For the reasons discussed below, the Court concludes this action should be transferred to the United States District Court for the Western District of Oklahoma.

A prisoner in custody pursuant to the judgment and sentence of a State court which has two or more Federal judicial districts may file a petition for writ of habeas corpus in either the district court for the district wherein such person is in custody or in the district court for the district within which the conviction was entered. 28 U.S.C. § 2241(d). Each of such district courts shall have concurrent jurisdiction over the petition and the district court wherein the petition is filed may, in the exercise of its discretion and in furtherance of justice, transfer the petition to the other district court for hearing and determination. Id.

In this case, Petitioner is incarcerated at Dick Conners Correctional Center, Hominy, Osage County, Oklahoma, located within the jurisdictional territory of the Northern District of Oklahoma. 28 U.S.C. § 116(a). Petitioner challenges his convictions entered in Garfield County District Court,

which is located within the territorial jurisdiction of the Western District of Oklahoma. 28 U.S.C. § 116(c). Because the most convenient forum for judicial review of the issues raised in this petition would be the Western District of Oklahoma where any necessary records and witnesses would most likely be available, the Court concludes that, in the furtherance of justice, this matter should be transferred to the United States District Court for the Western District of Oklahoma.

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's application for a writ of habeas corpus (doc.#1) and Petitioner's motion for leave to proceed in forma pauperis (doc. #2) are **transferred** to the United States District Court for the Western District of Oklahoma for all further proceedings. See 28 U.S.C. § 2241(d).

SO ORDERED THIS 17th day of May, 1999.

JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RUSSELL WEIBLEY,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

Case No. 99-CV-342-H (E)

ORDER

On April 28, 1999, Petitioner, a state inmate appearing *pro se*, filed a "motion for stay of proceedings" in the United States District Court for the Eastern District of Oklahoma. After opening the case as a 28 U.S.C. § 2254 petition for writ of habeas corpus, that Court transferred the case to this district court on May 5, 1999. The case was transferred because Petitioner challenges his conviction entered in Creek County District Court, located in the territorial jurisdiction of the Northern District of Oklahoma. See 28 U.S.C. § 2241(d).

In his motion for stay of proceedings, Petitioner states that he was convicted and sentenced to life without the possibility of parole on one count of First Degree Murder in Creek County District Court, Case No. CF-95-64. He perfected a direct appeal and the Oklahoma Court of Criminal Appeals affirmed the judgment and sentence. Petitioner maintains he is presently preparing his application for post-conviction relief, pursuant to Okla. Stat. tit. 22, §§ 1080, et seq., to raise eight (8) claims omitted from his direct appeal. Petitioner also states that he currently has a petition for writ of mandamus pending in the Oklahoma Court of Criminal Appeals. Petitioner requests that this action be stayed until he exhausts state remedies as to his eight additional claims.

7

It appears Petitioner is concerned that if he waits until he has exhausted available state remedies as required by 28 U.S.C. § 2254(b), he will not be able to file a federal petition for writ of habeas corpus within the limitations period prescribed by 28 U.S.C. § 2244(d). Petitioner correctly observes that prisoners in state custody who wish to challenge collaterally in federal habeas corpus proceedings either the fact or length of their confinement are required to exhaust state judicial remedies, either on direct appeal or through collateral proceedings, by presenting the highest state court available with a fair opportunity to rule on the merits of each and every claim they seek to raise in federal court. 28 U.S.C. § 2254(b), (c). This exhaustion requirement is not satisfied if there is a post-conviction or other collateral proceeding pending in state court. Sherwood v. Tomkins, 716 F.2d 632, 634 (9th Cir. 1983). A would-be federal habeas petitioner must await the outcome of the state proceeding before his state remedies are exhausted. Id. Therefore, Petitioner is correct that it would be premature to raise the eight claims he anticipates pursuing in a post-conviction proceeding or the claim presently before the Oklahoma Court of Criminal Appeals in this federal habeas proceeding.

However, Petitioner is advised that the running of the limitations clock is tolled, or suspended, during the pendency of state post-conviction proceedings "properly filed" during the one-year limitations period. Section 2244(d)(2) expressly provides for this tolling of the limitations period as follows:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2). In other words, as long as Petitioner properly files his post-conviction application in compliance with state procedural rules, i.e., those governing time and place of filing,

see Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998), the limitations period will be suspended during the time Petitioner's state proceeding is pending. The Court emphasizes that a properly filed post-conviction proceeding *suspends* the running of the one-year limitations period; the conclusion of a properly filed post-conviction proceeding does not trigger the commencement of the one-year period. See 28 U.S.C. § 2244(d)(1). Once a final order is issued in a properly filed post-conviction proceeding, the limitations clock begins ticking from the point it left off when the post-conviction application was filed. For example, if 210 days of the one-year period had elapsed when a petitioner filed an application for post-conviction relief, that petitioner would have 155 days within which to file a federal habeas petition once the state's highest court concluded its review of the properly filed post-conviction appeal.

In the instant case, assuming Petitioner did not file a petition for writ of *certiorari* in the United States Supreme Court after the Oklahoma Court of Criminal Appeals affirmed his conviction on direct appeal, Petitioner's conviction became final after the expiration of the 90-day time period for seeking *certiorari* review by the Supreme Court. See Maloney v. Poppel, No. 98-6402, 1999 WL 157428 (10th Cir. March 23, 1999); Kiel v. Scott, No. 98-6208, 1999 WL 76910 (10th Cir. Feb. 18, 1999); United States v. Lacey, No. 98-3030, 1998 WL 777067 (10th Cir. Oct. 27, 1998) (citing Griffith v. Kentucky, 479 U.S. 314, 321 n. 6 (1987), for the proposition that a "final judgment" in retroactivity context is "a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied"); see also Kapral v. United States, 166 F.3d 565, 570-71 (3d Cir. 1999). In other words, Petitioner's conviction became final 90 days after the Oklahoma Court of Criminal Appeals affirmed his conviction on direct appeal. If Petitioner would choose not to seek post-conviction

relief, he would have one year from that date to file a timely federal petition for writ of habeas corpus containing only exhausted claims. Should Petitioner choose to seek post-conviction relief in the state courts, the limitations clock will stop running during the pendency of properly filed post-conviction actions and will resume running when the state courts have completed review of Petitioner's claims.

Based on the representations contained in Petitioner's motion, the Court finds that if Petitioner proceeds diligently and promptly in his post-conviction proceedings, he should have sufficient time remaining on his limitations clock to refile his federal petition for writ of habeas corpus once he has satisfied the exhaustion requirement of § 2254(b). Therefore, the instant petition should be dismissed without prejudice to refiling. Petitioner's motion for a stay of these proceedings should be denied. Once the Oklahoma Court of Criminal Appeals issues its final order in a properly filed post-conviction appeal and in the event the state courts do not grant Petitioner's requested post-conviction relief, Petitioner should promptly refile his federal habeas petition, including only exhausted claims, within the time remaining on his limitations clock.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Petitioner's request to stay proceedings is denied.

2. The petition for writ of habeas corpus, filed as a "motion for stay of proceedings," is **dismissed without prejudice** to refiling.

IT IS SO ORDERED.

This 14th day of May, 1999.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT DENNIS BUNNER,

Defendant.

No. 94-CR-122-B
99-CV-256-B

ORDER

This matter comes before the Court on Defendant's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (#90) and "motion for prompt disposition of § 2255" (#91).

On May 18, 1999, the Court held a hearing on Defendant's motions. Defendant participated by telephone and was represented at the hearing by Chuck Whitman, an attorney from the Office of the Federal Public Defender. Assistant United States Attorneys Allen Litchfield and John Russell appeared for the government. At the hearing, the government conceded that Defendant's argument raised in the instant § 2255 motion is meritorious. Therefore, the Court finds Defendant's § 2255 motion should be granted and his conviction vacated. Defendant is entitled to be released from custody immediately. As a result of today's ruling, Defendant's "motion for prompt disposition of § 2255" has been rendered moot.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Defendant's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 (#90) is **granted**.

2. The Amended Judgment in a Criminal Case, entered March 20, 1997 (#82), memorializing Defendant's conviction for Possession of a Firearm by a Convicted Felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), **is vacated**.

3. Defendant shall be released from custody immediately.

4. Defendant's motion for prompt disposition of § 2255 (#91) is **moot**.

SO ORDERED THIS 18th day of May, 1999.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT DENNIS BUNNER,

Defendant.

No. 94-CR-122-B
99-CV-256-B

JUDGMENT

This matter came before the Court upon Defendant's motion to vacate set aside or correct sentence pursuant to 28 U.S.C. § 2255. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Defendant's conviction for possession of a firearm by a convicted felon entered herein March 20, 1997 (#82) for violation of 18 U.S.C. § § 922(g)(1) and 924(a)(2) is hereby vacated and judgment is entered in favor of Defendant, Robert Dennis Bunner, and against the Plaintiff, United States of America.

SO ORDERED THIS 18th day of May, 1999.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 13 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SULLIVAN SUPPLY INCORPORATED,

Plaintiff,

v.

BUEL JOBE,

Defendant.

Case No. 98-CV-0430-H(M)

ENTERED ON DOCKET
DATE MAY 17 1999

JUDGMENT PURSUANT TO FED. R. CIV. P. 68

After reviewing Defendant's Offer of Judgment and Plaintiff's Acceptance of Judgment, filed together with the Court on May 5, 1999, in accordance with Fed. R. Civ. P. 68, judgment is hereby granted to Plaintiff Sullivan Supply Incorporated in the above-captioned lawsuit based on copyright infringement.

Based on the offer and acceptance of judgment, the terms of the judgment are the following:

i. Defendant will pay the Plaintiff, as statutory damages pursuant to 17 U.S.C. § 504(c), Seventeen Thousand Five Dollars and no/100 ($17,005.00) for a single copyright infringement;

ii. An injunction will be entered against Defendant pursuant to the provisions of 17 U.S.C. § 502 on such grounds as the Court deems just and equitable.

iii. Defendant will permit the impounding and destruction of the original, copies, facsimiles or duplicates of Jobe's 1997 Blue Ribbon Show Supply Catalog pursuant to 17 U.S.C. § 503.

iv. Defendant will pay Plaintiff the costs which have accrued in this lawsuit, pursuant

61

to Fed. R. Civ. P. 68, as interpreted by the United States Supreme Court in Marek v. Chesney, 473 U.S. 1 (1985).

CLERK OF THE COURT
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA

SJM-1218

VR
5-10-99

ENTERED ON DOCKET
DATE MAY 17 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAY 14 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARY ELIZABETH JOHNSON,

Plaintiff,

vs.

CITY OF TULSA,

Defendant.

Case No. 97-CV 873 M

ORDER

Now on this 14th **day of** MAY, **1999**, the plaintiff's Motion to Dismiss with **prejudice** comes before the Court. Being fully apprised of the facts and circumstances surrounding plaintiff's request, the Court finds plaintiff's motion should be granted.

WHEREFORE, the Court **GRANTS** plaintiff's Motion to Dismiss with Prejudice.

Frank H. McCarthy
Frank H. McCarthy
United States Magistrate Judge

Approved:

Ronald D. Wilkinson
Ronald D. Wilkinson
Attorney for Plaintiff

Andrew T. Rees
Attorney for Defendant

45

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DONNA LOWE,	)	ENTERED ON DOCKET
	)	
Plaintiff,	)	DATE MAY 17 1999
	)	
v.	)	**No. 96-C-0066 K**
	)	
TOWN OF FAIRLAND, Oklahoma, a Municipal Corporation, BEVERLY HILL, DON JONES, SHIRLEY MANGOLD, LORETTA VINYARD, BILL PINION, RICHARD JAMES, and WALLACE, OWENS, LANDERS, GEE, MORROW, WILSON, WATSON & JAMES, A Professional Corporation,	)	F I L E D MAY 14 1999 Phil Lombardi, Clerk U.S. DISTRICT COURT
	)	
Defendants.	)	

ORDER OF DISMISSAL WITH PREJUDICE AS TO DEFENDANTS BEVERLY HILL, DON JONES, SHIRLEY MANGOLD AND LORETTA VINYARD

NOW ON this 13 day of May, 1999, it appearing to the Court that the parties have stipulated to the dismissal of several Defendants. The Defendants, Beverly Hill, Don Jones, Shirley Mangold and Loretta Vinyard, are hereby dismissed with prejudice to the refiling of a future action. Each party is to bear its own costs and attorneys' fees.

Honorable Terry C. Kern
United States District Judge

G:\FILES\382\92\Ord-DWP-eld.wpd\gdn

34

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STEVEN W. SOULE, Chapter 7 Trustee,

Appellant,

v.

DONALD L. WORLEY, and PEOPLES NATIONAL BANK OF EL RENO,

Appellees.

Case No. 97-CV-1142-H(J)

ORDER

This matter comes before the Court on the Report and Recommendation of the United States Magistrate Judge (Docket # 13) regarding Appellant Steven W. Soule's appeal of the decision rendered by the Bankruptcy Court. Appellant has filed an objection to the Report and Recommendation and Appellee Donald L. Worley has responded to Appellant's objection. A hearing was held before the Court on May 14, 1999.

When a party objects to the report and recommendation of a Magistrate Judge, Rule 72(b) of the Federal Rules of Civil Procedure provides in pertinent part that:

> [t]he district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Fed. R. Civ. P. 72(b).

The Magistrate Judge recommended that the Court affirm the decision of the Bankruptcy Court that the transfer at issue was unavoidable by the Trustee because it was not "property of the

estate," nor was it unjust enrichment. The Magistrate Judge further noted that Appellant did not develop his argument on appeal that the transfer could not be avoided as a fraudulent transfer. Appellant objected, claiming that the report "disregards the economic substance of the transaction at issue," and that an independently liable party which is statutorily obligated to pay Appellees does not defeat Appellant's unjust enrichment claim. Appellant's Objection to Report and Recommendation, at 5, 7.

Based upon a careful review of the Report and Recommendation of the Magistrate Judge, Appellant's objection, Appellee's response, and arguments propounded at the hearing, the Court finds that the Report and Recommendation to affirm the decision of the Bankruptcy Court should be adopted. Accordingly, the Bankruptcy Court's decision is hereby affirmed.

IT IS SO ORDERED.

This 14TH day of May, 1999.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

GARY VANCE MORELAND,

Plaintiff,

vs.

STATE OF OKLAHOMA,

Defendant.

Case No. 99-CV-321-K (E)

ORDER

Plaintiff is a prisoner appearing *pro se*. Now before the Court is Plaintiff's Civil Rights Complaint filed pursuant to 42 U.S.C. § 1983. For the reasons discussed below, the Court finds Plaintiff's complaint should be dismissed.

28 U.S.C. § 1915A provides as follows:

> (a) Screening. -- The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.
>
> (b) Grounds for dismissal. – On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint –
>
> (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or
>
> (2) seeks monetary relief from a defendant who is immune from such relief.

28 U.S.C. § 1915(A). After conducting the initial screening mandated by § 1915A, the Court finds that, even if the allegations in Plaintiff's Civil Rights Complaint are accepted as true, the Complaint fails to state a claim on which relief can be granted under 42 U.S.C. § 1983. See Fed. R. Civ. P.

12(b)(6) and Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (setting forth standards for evaluating the sufficiency of a claim).

Plaintiff alleges that Defendant, the State of Oklahoma, violated his civil rights and that pursuant to 42 U.S.C. § 1983, Defendant is liable for those violations. Plaintiff states that he is currently being held in Tulsa County Jail awaiting trial for Larceny of a Motor Vehicle. Plaintiff also states that he cannot be guilty of the charge because he was a passenger in the vehicle and the driver confessed to the charge when arrested. Plaintiff identifies three causes of action: (1) he was never informed of his rights and was never given a free phone call; (2) he was not sufficiently represented by his appointed counsel and was illegally charged by the D.A.'s office; and (3) he was illegally bound over for trial since no evidence was presented at the preliminary hearing. As relief, Plaintiff seeks "release from Tulsa Co. Jail, imediatly (sic), lost wages, pain and suffering, mental anguish, in the amount of $150,000.00." See Doc. No. 1.

After reviewing the complaint, the Court finds Plaintiff is challenging the very fact of his imprisonment. In Preiser v. Rodriguez, 411 U.S. 475, 500 (1973), the United States Supreme Court held that when a prisoner is challenging the very fact or duration of his imprisonment, and the relief he seeks is a determination that he is entitled to immediate relief or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus. Accordingly, the Court shall dismiss this complaint. Based on Plaintiff's representation that he is a currently a pretrial detainee, he will be required to file a separate § 2241 petition for a writ of habeas corpus if he wishes to continue to pursue his claims.

Although the substance of Plaintiff's claims for habeas corpus relief may be before the court in the instant § 1983 complaint, a separate habeas petition is required for several reasons. First, it is

necessary to place the case in the proper procedural posture. Habeas relief must be brought against the one in whose custody the prisoner is being held. Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 494-95 (1973). In addition, by reviewing the claims in a petition for a writ of habeas corpus, this court can better monitor compliance with the rules of exhaustion and guard against abuse of the writ.

Plaintiff's complaint is therefore dismissed. The Clerk of the Court shall send Plaintiff a § 2241 petition for a writ of habeas corpus form, motion for leave to proceed in forma pauperis form, and information and instruction sheets. Plaintiff should file a separate petition for a writ of habeas corpus if he wishes to pursue the claims raised in the instant complaint.

SO ORDERED THIS 13 day of May, 1999.

Terry C. Kern

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KIRBY BRUCE HARRAGARRA,)
)
Petitioner,)
)
v.) Case No. 99-CV-0043-K (E)
)
TWYLA SNIDER, Warden, et al.,)
)
Respondents.)

JUDGMENT

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Petitioner's action herein is dismissed without prejudice to refiling same, for failure to exhaust state remedies.

SO ORDERED THIS 12 day of May, 1999.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KIRBY BRUCE HARRAGARRA,

Petitioner,

v.

TWYLA SNIDER, Warden, et al.,

Respondents.

Case No. 99-CV-0043-K (E)

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge (Docket #11) entered on March 24, 1999, in this 28 U.S.C. § 2254 habeas corpus action. The Magistrate Judge recommends that Respondent's motion to dismiss the petition as a mixed petition be granted but that Petitioner be allowed thirty (30) days within which to file an amended petition deleting his unexhausted claim. On April 26, 1999, after receiving an extension of time, Petitioner filed his objection to the Report (#14).

Pursuant to Rule 8(b)(3), (4), *Rules Governing § 2254 Cases*, when a magistrate judge has issued a report and recommendation on a dispositive matter in a habeas corpus case, any party may serve and file written objections to the proposed finding and recommendations within ten days after being served with a copy. The district court judge then "shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." In accordance with Rule 8(b)(4), the Court has reviewed *de novo* those portions of the Report to which Petitioner has objected. After careful review of the entire Report and the record, the Court concludes that for the reasons discussed below the Report should be affirmed in part and overruled in part.

BACKGROUND

The Report provides a review of the facts giving rise to Petitioner's instant habeas corpus claims. To briefly summarize, on February 4, 1997, Petitioner, represented by an attorney from the Tulsa County Public Defender's Office, entered a "blind" plea of *nolo contendere* and was convicted of Assault and Battery with a Deadly Weapon, After Former Conviction of a Felony, in Tulsa County District Court, Case No. CRF-96-3058. After accepting the plea but prior to sentencing, the trial court heard testimony from the victim. Petitioner was sentenced to thirty-two (32) years imprisonment and ordered to pay a $500 fine and $9,000 in restitution.

On February 5, 1997, Petitioner filed a *pro se* motion to withdraw guilty plea alleging that his attorney provided ineffective assistance when he failed to advise Petitioner of the consequences of entering a plea of *nolo contendere*. At the February 6, 1997 hearing on Petitioner's motion, Petitioner was represented by the same public defender who represented him at the plea hearing. The trial court denied the requested relief.

Petitioner, represented by a different attorney from the Tulsa County Public Defender's Office, filed his petition for writ of certiorari in the Oklahoma Court of Criminal Appeals. He argued that (1) he was deprived of effective assistance of counsel at the motion to withdraw plea hearing, because counsel, acting under a conflict of interest, did not effectively argue Petitioner's ineffective assistance of counsel claim, (2) the order to pay $9,000 in restitution was arbitrary and not founded on suitable proof, and (3) the judgment and sentence erroneously described the conviction and should be corrected *nunc pro tunc*. On January 12, 1998, the Oklahoma Court of

Criminal Appeals affirmed the trial court's denial of the motion to withdraw guilty plea.[1] Petitioner did not seek *certiorari* review of his conviction in the United States Supreme Court. Petitioner has not sought post-conviction relief in the state courts.

On January 14, 1999, the Clerk of Court received the instant petition for writ of habeas corpus for filing. Petitioner alleges that he received ineffective assistance of trial counsel based on his attorney's failure to (1) object to the trial court's denial of Petitioner's motion to suppress the in-court identification, (2) advise Petitioner of all consequences stemming from entering a plea of *nolo contendere*, and (3) allow Petitioner to have new counsel at the motion to withdraw plea hearing. See #2. On February 1, 1999, Petitioner filed a "motion to construe pleading as timely filed" (#5). Thereafter, Respondent filed a motion to dismiss without prejudice for failure to exhaust state remedies (#7) alleging that Petitioner's first claim of ineffective assistance of counsel, the "identification" issue, had not been presented to the Court of Criminal Appeals and was not exhausted.

In the Report, the Magistrate Judge finds that the petition is a mixed petition containing both exhausted and unexhausted claims and should be dismissed without prejudice for failure to exhaust available state remedies. However, the Magistrate Judge also concludes that because Petitioner faces an "insurmountable" limitations problem, he should be allowed to amend his petition to delete his unexhausted claim so that he may proceed on his exhausted claims.

In his objection, Petitioner cites Stewart v. Martinez-Villareal, 523 U.S. 637 (1998), for the proposition that after a petition has been dismissed without prejudice as premature, a subsequent

[1]The Court of Criminal Appeals also vacated the order of restitution and remanded the issue to the trial court for proper determination of the amount of the victim's loss. (#8, Ex. C at 7).

petition will not be barred as a second or successive petition under 28 U.S.C. § 2244(b). Petitioner also objects to the failure of the Magistrate Judge to identify a third separate claim of ineffective assistance of counsel, i.e., trial counsel's failure to seek appointment of different counsel at the hearing on the motion to withdraw plea due to a conflict of interest.

ANALYSIS

After reviewing the record in this case, the Court finds that the instant petition contains two exhausted claims and one unexhausted claim. In addition, it is not clear that the unexhausted claim would be procedurally barred in state court. Therefore, the Court agrees with the Magistrate Judge's conclusion that this is a mixed petition and should be dismissed without prejudice to refiling after available state remedies are exhausted. See 28 U.S.C. § 2254(b); Rose v. Lundy, 455 U.S. 509, 510 (1982).

As to Petitioner's objection concerning the conflict of interest issue, the Court notes that the Magistrate Judge did acknowledge Petitioner's conflict of interest claim, but considered it a part of the claim related to counsel's failure to advise him that the victim would be allowed to testify after entry of the *nolo contendere* plea. See #11 at n.1. To the extent the conflict of interest issue is a separate claim of ineffective assistance of counsel, the Court finds Petitioner has fairly presented the claim to the Oklahoma Court of Criminal Appeals and it is, therefore, exhausted.

Furthermore, Petitioner is correct that a subsequent petition filed after exhausting available state remedies will not be barred as a second or successive petition based on the prior dismissal without prejudice of a petition for failure to exhaust. Nonetheless, it is possible for a subsequent petition to be barred by the expiration of the limitations period imposed by § 2244(d)(1).

However, the Court disagrees with the Magistrate Judge's conclusion that Petitioner in this case has an insurmountable statute of limitations problem. The Antiterrorism and Effective Death Penalty Act ("AEDPA") amended the habeas corpus statute to provide as follows:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run form the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review . . . .

28 U.S.C. § 2254(d)(1). For purposes of the one-year limitations period imposed on § 2254 petitions, the judgment of conviction does not become "final" until the Supreme Court affirms a defendant's conviction and sentence on the merits or denies a timely filed petition for certiorari; if the defendant does not file a certiorari petition, the judgment of conviction does not become "final" until time for seeking certiorari review expires. See Maloney v. Poppel, No. 98-6402, 1999 WL 157428 (10th Cir. March 23, 1999); Kiel v. Scott, No. 98-6208, 1999 WL 76910 (10th Cir. Feb. 18, 1999); United States v. Lacey, No. 98-3030, 1998 WL 777067 (10th Cir. Oct. 27, 1998) (citing Griffith v. Kentucky, 479 U.S. 314, 321 n. 6 (1987), for the proposition that a "final judgment" in retroactivity context is "a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied"); see also Kapral v. United States, 166 F.3d 565, 570-71 (3d Cir. 1999).

In the instant case, the Oklahoma Court of Criminal Appeals affirmed the trial court's denial of Petitioner's motion to withdraw plea on January 12, 1998. Therefore, since he did not petition the United States Supreme Court for certiorari review, his conviction became "final" ninety (90) days later, after the time for filing a timely petition for certiorari in the Supreme Court had elapsed, or on April 12, 1998. See Rule 13(1), *Rules of the Supreme Court of the United States*. As a result, a

federal petition filed by April 12, 1999, would be timely.

Petitioner filed the instant petition on January 14, 1999, with 88 days remaining in the limitations period. Because the time spent pursuing properly filed post-conviction relief in the state courts will toll, or suspend, the limitations period, see § 2254(d)(2), Petitioner will have sufficient, although limited, time to refile a federal petition for writ of habeas corpus containing only exhausted claims once the Oklahoma Court of Criminal Appeals has completed post-conviction review of any unexhausted claims. Therefore, Petitioner should not be required to amend his instant petition to delete his unexhausted claim, as recommended by the Magistrate Judge.[2]

The Court emphasizes that the time between the dismissal without prejudice of the instant petition and the filing of an application for post-conviction relief in the state trial court added to the time between the entry of an order by the Oklahoma Court of Criminal Appeals resolving a properly filed post-conviction appeal and the refiling of a federal petition for writ of habeas corpus cannot exceed 88 days.[3] If the total elapsed time exceeds 88 days, Petitioner's refiled petition will be barred by the statute of limitations and federal habeas corpus review will be precluded.

---

[2]Nonetheless, Petitioner may choose to avoid the risk of the limitations bar by abandoning his unexhausted claim and proceeding in this Court on only his presently exhausted claims. If Petitioner wishes to proceed on his exhausted claims only, he should submit, within 88 days of the entry of this Order, a petition for writ of habeas corpus deleting his unexhausted claim. However, Petitioner is advised that this Court will be precluded from reviewing an abandoned unexhausted claim if raised in a later petition.

[3]By way of illustration, if Petitioner were to file his application for post-conviction relief in Tulsa County District Court 30 days after the instant action is dismissed without prejudice, he would then have 58 days within which to file a federal petition for writ of habeas corpus after the Oklahoma Court of Criminal Appeals enters it order resolving a properly filed post-conviction appeal. Fifty-nine days would be too late because 30 + 59 is 89, one day more than remains in Petitioner's limitations period.

CONCLUSION

Based on the above analysis, the Court affirms the portion of the Magistrate Judge's Report recommending that Respondent's motion to dismiss without prejudice be granted but overrules the portion recommending that Petitioner be required to file an amended petition deleting his unexhausted claim. The petition for writ of habeas corpus should be dismissed without prejudice for failure to exhaust available state remedies.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The Report and Recommendation of the United States Magistrate Judge (#11) is **affirmed in part and overruled in part.**
2. Respondent's motion to dismiss for failure to exhaust state remedies (#7) is **granted**.
3. The petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **dismissed without prejudice for failure to exhaust state remedies.**
4. Should Petitioner choose to exhaust state remedies and the state courts deny post-conviction relief on Petitioner's unexhausted claim(s), he may refile a petition for writ of habeas corpus in this Court. However, should Petitioner fail to refile his petition within the time constraints identified in this Order, federal habeas corpus review will be barred by the statute of limitations imposed by 28 U.S.C. § 2254(d)(1).

SO ORDERED THIS 7 day of May, 1999.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ONEOK, INC.,
an Oklahoma corporation

Plaintiff,

v.

SOUTHERN UNION COMPANY,
a Delaware corporation,

Defendant.

Case No. 99-CV-0345H (M)

FILED
MAY 17 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER CONVERTING TEMPORARY RESTRAINING ORDER TO PRELIMINARY INJUNCTION

This matter comes on for consideration of the parties' Stipulation Regarding Conversion of Temporary Restraining Order to Preliminary Injunction ("Stipulation"). It is hereby ordered:

1. The Stipulation is approved.

2. Pursuant to the Stipulation, the temporary restraining order dated May 11, 1999, is hereby converted to a preliminary injunction, and the $1,000,000 bond shall stand as security for the preliminary injunction, pursuant to the requirements of Fed.R.Civ.P. 65(c).

3. The defendant's motion for a stay of the temporary restraining order, made in open court on May 11, 1999, and denied by the Court on the same date, is hereby deemed to have been renewed with respect to the Preliminary Injunction, and the same is hereby denied.

Dated this 17TH day of May, 1999.

SVEN ERIK HOLMES
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RENEE RAIFORD,	)	ENTERED ON DOCKET
	)	
Plaintiff,	)	DATE MAY 17 1999
	)	
vs.	)	**No. 98-CV-750-K**
	)	
UNITED VIDEO SATELLITE GROUP,	)	
	)	
	)	**F I L E D**
Defendant.	)	
		MAY 14 1999
		Phil Lombardi, Clerk U.S. DISTRICT COURT

ORDER

This action was filed by the Plaintiff on October 1, 1998. Pursuant to *Fed.R.Civ.P. 4(m)*, the Plaintiff had one hundred and twenty days (120) to serve the Defendant with a copy of the summons and the complaint. This Court extended time for Plaintiff to serve summons until May 3, 1999. Prior to that date, Plaintiff again requested leave for an extension of time to serve summons, which this Court denied per Court Order dated May 5, 1999, requiring that Plaintiff serve summons within seven (7) days or the case would be dismissed (#9). The Plaintiff has not complied with the Court's Order, and has failed to serve the Defendant with a copy of the summons and complaint in this case.

Because the Plaintiff has not shown good cause for failure to serve, the Court finds that the above styled case must be dismissed WITHOUT PREJUDICE pursuant to *Fed. R. Civ. P. 4(m)* and *Fed.R.Civ.P. 12(b)(4) and 12(b)(5)*.

ORDERED THIS 13 DAY OF MAY, 1999.

Terry C. Kern

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

10

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CLARENCE E. BROTHERS,
443-50-3345

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner, Social Security
Administration,

Defendant.

98-CV-503-H(M)

ORDER

This matter comes before the Court on the Report and Recommendation of the United States Magistrate Judge filed March 31, 1999 (Docket #8) recommending that the decision of the Commissioner finding Plaintiff not disabled be affirmed.

In accordance with 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b), any objections to the Report and Recommendation must be filed within ten (10) days of the receipt of the report. The time for filing objections to the Report and Recommendation has expired, and no objections have been filed.

Based on a review of the Report and Recommendation of the Magistrate Judge, the Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge.

IT IS SO ORDERED.

This 14TH day of May, 1999.

Sven Erik Holmes
United States District Judge

9

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KENNETH L. HARDING,
Plaintiff,

v.

AVIATION SALES COMPANY, a Delaware corporation, AVIATION SALES DISTRIBUTION SERVICES COMPANY, f/k/a Aviation Sales Operating Company, d/b/a Aviation Sales Company (a subsidiary of Aviation Sales Company), AVENG TRADING PARTNERS INC., a dissolved Delaware corporation, and JAMES C. STOECKER,
Defendants.

Case No. 98-CV-403-B (E)

Judge Thomas R. Brett

ORDER OF DISMISSAL WITH PREJUDICE

This cause comes before the Court on the parties' Stipulation of Dismissal With Prejudice, and upon being advised that the parties are in agreement regarding the dismissal of this case as indicated by said Stipulation, finds that said Stipulation is proper, and this case would be dismissed with prejudice.

IT IS THEREFORE ORDERED, that this action, including all claims and causes of action between the parties, is hereby dismissed with prejudice, each party to bear its own costs and fees.

Dated this 14th day of May, 1999.

Thomas R. Brett
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

Stewart E. Field (OBA #2891)
McCormick & Field, P.L.L.C.
5314 South Yale, Suite 601
Tulsa, OK 74135
Attorney for Defendant
AvEng Trading Partners
and James C. Stoecker

Craig W. Hoster (OBA #4384)
Crowe & Dunlevy
500 Kennedy Building
321 South Boston
Tulsa, OK 74103-3313
Attorney for Defendant
Aviation Sales Company and
Aviation Sales Distribution Services Company

John A. Burkhardt, (OBA #1336)
Frederic N. Schneider, III (OBA #8010)
Boone, Smith, Davis, Hurst & Dickman
500 ONEOK Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103
(918) 587-0000
Attorneys for Plaintiff, Kenneth L. Harding

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

COREY VANCLEAVE,	§	ENTERED ON DOCKET
	§	
Plaintiff,	§	DATE MAY 14 1999
	§	
v.	§	**Case No. 98-CV-472K(J)**
	§	
CHEVRON U.S.A., INC.,	§	
HYPERION ENERGY, L.P.,	§	
a partnership, HYPERION	§	FILED
RESOURCES, INC., and	§	
ATLANTIC RICHFIELD COMPANY,	§	MAY 13 1999
	§	
Defendants.	§	Phil Lombardi, Clerk U.S. DISTRICT COURT

ORDER

Upon the joint application of Plaintiff, Corey VanCleave and Defendants Chevron U.S.A. Inc., Atlantic Richfield Company, Hyperion Energy, L.P., and Hyperion Resources, Inc. and for good cause shown,

It is hereby ordered that the parties' Joint Application for Dismissal with Prejudice is granted by the Court. Accordingly, the Court hereby orders that this lawsuit is dismissed with prejudice to the refiling of claims asserted herein, with each party to bear their own costs and attorneys' fees.

DATED this 12TH day MAY, 1999.

UNITED STATES DISTRICT JUDGE

36793

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KENNETH J. HERRION,

Plaintiff,

vs.

STANLEY GLANZ, et al.,

Defendants.

No. 99-CV-11-H (M)
(BASE FILE)

99-CV-12-H (J)

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge entered on April 16, 1999 (#5), in this consolidated civil rights action brought pursuant to 42 U.S.C. § 1983. The Magistrate Judge recommends that Plaintiff's complaint be dismissed without prejudice because Plaintiff has failed either to pay the initial partial filing fee or to show cause in writing for his failure to pay, as directed by the Court in its March 2, 1999 Order (#3). Plaintiff has not filed an objection to the Report and the time for filing an objection has expired.

Having reviewed the Report and the facts of this case, pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court concludes that the Report should be adopted and affirmed.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The Report and Recommendation of the Magistrate Judge (Docket #5) is **adopted and affirmed.**

2. Plaintiff's consolidated civil rights complaint is **dismissed without prejudice** for failure to pay the initial partial filing fee.

3. The Clerk is directed to file and docket a copy of this Order in Case No. 99-CV-12.

IT IS SO ORDERED.

This 12th day of May, 1999.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KENNETH J. HERRION,)
)
Plaintiff,)
)
vs.) No. 99-CV-11-H (M)
) (BASE FILE)
STANLEY GLANZ, et al.,)
) 99-CV-12-H (J)
)
Defendants.)

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge entered on April 16, 1999 (#5), in this consolidated civil rights action brought pursuant to 42 U.S.C. § 1983. The Magistrate Judge recommends that Plaintiff's complaint be dismissed without prejudice because Plaintiff has failed either to pay the initial partial filing fee or to show cause in writing for his failure to pay, as directed by the Court in its March 2, 1999 Order (#3). Plaintiff has not filed an objection to the Report and the time for filing an objection has expired.

Having reviewed the Report and the facts of this case, pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court concludes that the Report should be adopted and affirmed.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The Report and Recommendation of the Magistrate Judge (Docket #5) is **adopted and affirmed**.

2. Plaintiff's consolidated civil rights complaint is **dismissed without prejudice** for failure to pay the initial partial filing fee.

3. The Clerk is directed to file and docket a copy of this Order in Case No. 99-CV-12.

IT IS SO ORDERED.

This 12th day of May, 1999.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BETTY McCLURE,

Plaintiff,

vs.

INDEPENDENT SCHOOL DISTRICT NO. 16 OF MAYES COUNTY, STATE OF OKLAHOMA, also known as the Salina Public School District; MARION STINSON, individually; LARRY MILLS, individually; DENNIS WESTON, individually; JOE BROWN, individually; BILLY RICE, individually,

Defendants.

No. 97-CV-825-B

JUDGMENT

In keeping with the Findings of Fact and Conclusions of Law entered herein this date, the Court hereby enters judgment for an attorney fee in the amount of $52,500.00, plus reasonable expenses of $274.65, for a total sum of $52,774.65, in favor of the Plaintiff, Betty McClure, and against the Defendant, Independent School District No. 16 of Mayes County, Oklahoma, State of Oklahoma, also known as the Salina Public School District. The Court further awards post-judgment interest on the attorney fee award at the rate of 4.727% per annum.

79

ENTERED this 13th day of May, 1999.

THOMAS R. BRETT
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BETTY McCLURE,

Plaintiff,

vs.

INDEPENDENT SCHOOL DISTRICT NO. 16 OF MAYES COUNTY, STATE OF OKLAHOMA, also known as the Salina Public School District; MARION STINSON, individually; LARRY MILLS, individually; DENNIS WESTON, individually; JOE BROWN, individually; BILLY RICE, individually,

Defendants.

No. 97-CV-825-B

ORDER REGARDING ATTORNEY FEES

The Plaintiff's attorney fee application (Docket #54) against the Defendant, Independent School District No. 16 of Mayes County, State of Oklahoma, came on for hearing May 11, 1999. After consideration of the evidence and the applicable law, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. In this public employment termination case the Plaintiff was the prevailing party and awarded $37,015.65 in damages for one year's wages. Plaintiff, as the prevailing party, is entitled to an award of a reasonable attorney fee.

2. At the attorney fee hearing the Defendant stipulated the requested $175.00 per

hour rate of Plaintiff's counsel is reasonable.

3. Plaintiff requests a total attorney fee of $66,211.25, and expenses of $274.65. The attorney fee request is based on 378.35 hours of legal services herein.

4. Considering the complexity of the case, or lack thereof, and other relevant matters, the Court concludes it is unreasonable for Plaintiff's counsel to spend in excess of 300 hours total in prosecution of this action. The excess hours of 78.35 were spent in discovery duplication, excess travel charges, excess time in response to Defendants' motion for summary judgment, excess preparation time for Plaintiff's deposition, and excess preparation of fee application.

5. A reasonable attorney fee in this case cannot exceed the total sum of 300 hours. 300 hours x $175.00 per hour = $52,500.00. Plaintiff's counsel is entitled to additional reasonable expenses of $274.65. Thus, the total reasonable attorney fee and expenses is $52,774.65.

CONCLUSIONS OF LAW

1. The Court has authority to award attorney fees herein under 42 U.S.C. §1988.

2. Any Finding of Fact above which might be reasonably characterized a Conclusion of Law is incorporated herein.

3. In calculating a reasonable attorney fee, the Court must first determine the number of hours reasonably spent by counsel for the party seeking the attorney fee. *Blum v. Stenson*, 465 U.S. 886 (1984); *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Robinson v. City of Edmond*, 160 F.3d 1274, 1284 (10th Cir. 1998); *Case v. Unified School District No.*

233, Johnson County, Kansas, 157 F.3d 1243 (10th Cir. 1993); *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983).

4. Based on the above, the Court considers a reasonable attorney fee in this case to be the sum of $52,500.00, plus reasonable expenses of $274.65, for a total sum of $52,774.65. A separate judgment in keeping with the Findings of Fact and Conclusions of Law set out above shall be filed contemporaneously herewith.

DATED this 13th day of May, 1999.

THOMAS R. BRETT
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 99CV0089B(J)
	)	
WILLIAM B. SMITH,	)	
	)	
Defendant.	)	

DEFAULT JUDGMENT

This matter comes on for consideration this 13th day of May, 1999, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, William B. Smith, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, William B. Smith, was served with Summons and Complaint on January 29, 1999, and acknowledged service by signing a Waiver of Service of Summons on February 1, 1999. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, William B. Smith, for the principal amount of $4,092.04, plus accrued interest of $172.89, plus administrative charges in the amount of

10

$25.65, plus interest thereafter at the rate of 7.51 percent per annum until judgment, plus filing fees in the amount of $150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 4.727 percent per annum until paid, plus costs of this action.

United States District Judge

Submitted By:

LORETTA F. RADFORD, OBA # 11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918)581-7463

LFR/dlo

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 99CV0323K(M)
	)	
DONALD R. CARTER,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET
DATE MAY 13 1999

NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Loretta F. Radford, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 12th day of May, 1999.

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

Loretta F. Radford

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 W. 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 12th day of May, 1999, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Donald R. Carter, 632 E. 50th St. N., Tulsa, OK 74126.

Janet M. Owen

Janet M. Owen
Financial Litigation Unit

LFR/jmo

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHERIE PIPKIN, et al,
Plaintiff(s),
vs.
COMMERCIAL FINANCIAL SERVICES, INC.
Defendant(s).

Case No. 98-C-939-B

ADMINISTRATIVE CLOSING ORDER

The Defendant Commercial Financial Services having filed its petition in bankruptcy and these proceedings being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any purpose required to obtain a final determination of the litigation.

IF, within 60 days of a final adjudication of the bankruptcy proceedings or a lifting of the stay, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 12th day of May, 1999.

THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

19

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KENNETH L. HARDING,
Plaintiff,

v.

AVIATION SALES COMPANY, a Delaware corporation, AVIATION SALES DISTRIBUTION SERVICES COMPANY, f/k/a Aviation Sales Operating Company, d/b/a Aviation Sales Company (a subsidiary of Aviation Sales Company), AVENG TRADING PARTNERS INC., a dissolved Delaware corporation, and JAMES C. STOECKER,
Defendants.

Case No. 98-CV-403-B (E)

Judge Thomas R. Brett

STIPULATION OF DISMISSAL WITH PREJUDICE

It is hereby stipulated by the undersigned counsel of record for each of the parties in the above-captioned case that the above-entitled case, including all causes of action, and claims may be dismissed with prejudice, each party to bear its own costs and attorney fees.

Dated this 12 day of May, 1999.

Respectfully submitted,

Stewart E. Field (OBA #2891)
McCormick & Field, P.L.L.C.
5314 South Yale, Suite 601
Tulsa, OK 74135
Attorney for Defendant AvEng Trading Partners and James C. Stoecker

Craig W. Hoster (OBA #4384)
Crowe & Dunlevy
500 Kennedy Building, 321 South Boston
Tulsa, OK 74103-3313
Attorney for Defendant Aviation Sales Company and Aviation Sales Distribution Services Company

John A. Burkhardt, (OBA #1336)
Frederic N. Schneider, III (OBA #8010)
Boone, Smith, Davis, Hurst & Dickman
500 ONEOK Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103
(918) 587-0000
Attorneys for Plaintiff, Kenneth L. Harding

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 98-CR-84-C
	)	99-CV-327-C ✓
ORLANDO REED,	)	
	)	
Defendant.	)	

JUDGMENT

This matter came before the Court for consideration of defendant Orlando Reed's motion to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. § 2255. The motion having been duly considered and a decision having been rendered in accordance with the Order filed previously,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for plaintiff, the United States of America, and against defendant, Reed, on his challenge to the legality of his sentence.

IT IS SO ORDERED this 7th day of May, 1999.

H. Dale Cook
Senior United States District Judge

3

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
ORLANDO REED,)
)
Defendant.)

Case No. 98-CR-84-C
99-CV-327-C

ORDER

Before the Court is defendant, Orlando Reed's, pro se motion seeking to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. § 2255.

In June 1998, Reed was named in four Count Indictment, charging him with conspiracy to commit bank fraud, possession and use of counterfeit devices, and possession of a firearm after being convicted of a felony. On August 17, 1998, Reed waived jury trial and entered a plea of guilty to Count One, pursuant to a plea agreement. On November 19, 1998, the Court sentenced Reed to twenty-two months' imprisonment, and ordered him to pay $5,570.89 in restitution. Reed did not file a direct appeal following entry of judgment. Reed timely filed the present motion on April 28, 1999, and the Court notes that this is his first such motion.

The Court notes at the outset the well-settled principle that "§ 2255 is not available to test the legality of matters which should have been raised on appeal." U.S. v. Walling, 982 F.2d 447, 448 (10th Cir.1992). A failure to raise an issue on direct appeal thus acts as a bar to raising the issue in a § 2255 motion unless Reed can show cause and actual prejudice or can show that a fundamental miscarriage of justice will result if his claim is not addressed. U.S. v. Allen, 16 F.3d 377, 378 (10th

2

Cir.1994). This procedural bar applies to collateral attacks on a defendant's sentence, as well as his conviction. Id.

In order to overcome the procedural bar, Reed relies upon the universal claim of ineffective assistance of counsel. "While ordinarily the procedural bar rule . . . applies to section 2255 proceedings . . . it does not apply to ineffective assistance of counsel claims." U.S. v. Galloway, 56 F.3d 1239, 1241 (10th Cir. 1995) (citations omitted). Hence, a "defendant may establish cause for procedural default by showing he received ineffective assistance of counsel." U.S. v. Cox, 83 F.3d 336 (10th Cir.1996).

A claim of ineffective assistance of counsel requires that Reed satisfy the rigid standard contained in Strickland v. Washington, 466 U.S. 668 (1984). The Supreme Court in Strickland held that a claim of ineffective assistance of counsel has two components. First, Reed must show that his attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Id. at 687. "The proper standard for attorney performance is that of reasonably effective assistance." Id. Therefore, to succeed, Reed must show that his counsel's performance fell below an objective standard of reasonableness. Furthermore, Reed must show that "the deficient performance prejudiced the defense." Id. For the reasons stated below, the Court concludes that Reed failed to satisfy the Strickland standard for demonstrating ineffective assistance of counsel.

Reed's sole claim is that his counsel was ineffective during sentencing in failing to object to the use of a particular juvenile conviction to increase his criminal history points. Specifically, Reed points to paragraph 32 of the Presentence Report (PSR), which states that, on April 23, 1986, when Reed was 17 years old, he was arrested for larceny of an automobile. The PSR also states that he pled guilty to that charge in March 1987 and received a sentence of three years' imprisonment.

Three criminal history points were therefore added to Reed's criminal history computation, pursuant to Guideline § 4A1.1(c). There is no indication in the record that Reed's counsel objected to the use of this prior offense in calculating his criminal history category. However, even assuming, arguendo, that counsel was deficient,[1] Reed cannot show prejudice.

The essence of Reed's complaint is that the Court committed prejudicial error when it included this "outdated prior juvenile conviction" for the purpose of calculating his criminal history category. Upon the Court's request, however, the Probation Office, through Larry Morris, provided the Court with a certified copy of the Oklahoma State Court Judgment and Sentence related to the larceny of an automobile charge, which Officer Morris relied upon when formulating the PSR. The Judgment and Sentence, entered by the Oklahoma District Court for Tulsa County and dated March 5, 1987, reveals that Reed was regarded as an adult. The Judgment and Sentence further shows that Reed was sentenced to three years' imprisonment at the Oklahoma State Penitentiary in McAlester, Oklahoma, which is clearly not an institution in which the State of Oklahoma places those defendants who are regarded as juveniles. The Court is therefore satisfied that the March 1987 conviction for larceny of an automobile in state court constitutes a prior adult criminal conviction for purposes of calculating Reed's criminal history category.

For offenses committed prior to the age of eighteen, Guideline § 4A1.2(d)(1) provides that, "If the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add 3 points under § 4A1.1(a) for each such sentence." Further, § 4A1.2(e) provides that, "Any prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense is counted." Since Reed was regarded and treated as an adult with respect to his 1987 conviction for larceny of

[1] Of course, counsel is not deficient for failing to raise and argue a clearly meritless issue.

an automobile, which is within fifteen years of his commencement of the instant offense, and since that state court conviction resulted in an adult sentence of imprisonment exceeding one year and one month, Guideline §§ 4A1.2(d)(1) and (e) provide for the inclusion of three criminal history points when calculating the criminal history category. The Court therefore finds no prejudicial error in Reed's sentence.

Accordingly, Reed's motion pursuant to § 2255 is hereby DENIED.

IT IS SO ORDERED this 7th day of May, 1999.

H. DALE COOK
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EVERETTE B. CALDWELL,

Plaintiff,

vs.

SUNBELT COATING, INC. OF OKLAHOMA, an Oklahoma corporation,

Defendant.

Case No. 98CV-0634BU(M)

ORDER OF DISMISSAL WITH PREJUDICE

The Plaintiff and Defendant, having compromised and settled all issues in the action and having stipulated that the Complaint and the action may be dismissed with prejudice, it is therefore,

ORDERED, that the Complaint and this cause of action are, by the Court, dismissed with prejudice to the bringing of another action upon the same cause or causes of action.

Entered this 10th day of May, 1999.

Michael Burrage
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 10 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BILL BEAMAN and LELA BEAMAN, husband and wife,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF THE ARMY CORPS OF ENGINEERS,

Defendant.

Case No. 96C-419-H
The Honorable Sven Erik Holmes

ENTERED ON DOCKET

DATE MAY 12 1999

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiffs, Bill Beaman and Lela Beaman, and Defendant, United States Department of the Army Corps of Engineers, by and through their undersigned counsel of record, and pursuant to Fed.R.Civ.P. 41 stipulate to the voluntary dismissal with prejudice of this action by reason of a settlement agreement entered into by and between said Plaintiff and Defendant.

Each party shall bear their own costs and attorneys fees incurred in connection with this action.

Respectfully Submitted,

JONES, GIVENS, GOTCHER & BOGAN

William G. LaSorsa, OBA #5252
15 East 5th Street, Suite 3800
Tulsa, Oklahoma 74103-4309
(918) 581-8200 FAX (918)583-1189
ATTORNEYS FOR PLAINTIFFS

Stephen G. Bartell, Esq.
United States Dept. of Justice
P. O. Box 663
Washington, DC 20044-0663
ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing document was mailed by United States mail, postage prepaid thereon on the 10th day of May, 1999, to:

Stephen C. Lewis Esq.
United States Attorney
Cathryn McClanahan, Esq.
Assistant United States Attorney
Northern District of Oklahoma
333 W. 4 St., #3460
Tulsa, OK 74103-3808

Frank G. Swift Jr., Esq.
Assistant District Counsel
United States Army Corps of Engineers
Little Rock District
Little Rock, AR 72203-0867

William G. LaSorsa

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

NORMA J. HATCHER,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Defendant.

Case No. 98-CV-579-M

ORDER

IT IS ORDERED, ADJUDGED AND DECREED that this case be, and it is hereby remanded to the Defendant for further administrative action pursuant to sentence four (4) of § 205(g) of the Social Security Act, 42 U.S.C. § 405(g). *Melkonyan v. Sullivan*, 501 U.S. 89 (1991).

THUS DONE AND SIGNED on this 10th day of May 1999.

Frank H. McCarthy
FRANK H. McCARTHY
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

NORMA J. HATCHER,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Defendant.

CASE NO. 98-CV-579-M

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 10th day of MAY, 1999.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE